CASES AND LEGISLATIONS CONCERNING ARTIFICIAL INSEMINATION: COMPARATIVE STUDY OF JAPANESE LAW

By ICHIRO SHIMAZU*

I. Introduction

That a woman gets pregnant by permeation of the soul of one of her ancestors into her womb while she is bathing in the ocean is the mysticism of birth believed in "primitive" societies. The advancement of science stripped the veil from mysticism and established the natural law of birth. Once this natural law had been proved, it became possible to put knowledge of the law to practical use to control, prevent or supply, the birth of a child. But artificial insemination, as a technique for inducing pregnancy in case of the husband's being impotent or sterile, has only recently been used.

There are two kinds of artificial insemination: homologous insemination (commonly referred to as AIH) and heterologous insemination (AID). The latter causes many more legal difficulties than the former, particularly with regard to the questions as to whether it constitutes adultery as grounds for divorce and whether the resulting child is illegitimate.

The number of children born of artificial insemination who are alive now is estimated at over 350,000 in the entire world (among them 250,000 in the United States). It is necessary to establish a legal judgment regarding artificial insemination for the sake of wives attempting this procedure and their children. Moreover, artificial insemination is a technique which cannot be dealt with by existing legal concepts and so it raises several very interesting theoretical questions.

The fact that the natural law has been proved and the judgment as to whether we human beings should put this knowledge to practical use are quite different. There is so much literature relating to whether the practice of insemination should be approved morally, religiously, and legally that the writer has not been able to read it all. However, the study of approximately ten judicial cases and two statutes has given this writer an indication of the general tendency of legal decisions on artificial insemination. The present paper concerns first the description of those cases, secondly the analysis of cases and statutes and finally a comparison of the Anglo-American law with Japanese law.

* Professor (Kyōju) of Law.

1 If fertilization inside a test-tube is possible, impotent wives can have children too. Newsweek, Mar. 9, 1970. p. 45.

2 According to Notes, Social and Legal Aspects of Human Artificial Insemination, 1965 Wis. L. Rev. 860, the British physician, John Hunter performed the first artificial insemination. This was reported to the Royal Society of London in 1799.


4 Finegold, supra n. 3 includes complete bibliographical references.
The fundamental concept of marriage is generally the crucial factor in resolving the question of whether artificial insemination should be legally approved. Accordingly, it will be emphasized in the chapter of an analysis of cases and statutes that opinions rendered by various courts be scrutinized in connection with the concept of marriage.

II. A Description of the Cases

A. Orford v. Orford

The couple involved in this case were married in Canada and spent their honeymoon in England. After two months in England the husband returned to Canada, leaving his wife with her parents. The marriage was not consummated during that period because sexual intercourse caused her the great pain due to her physical infirmity (retroflexion). Five years later she gave birth to a boy and registered him as a child of Mr. and Mrs. Hodgkinson (her maiden name also was given in the registration). After a while she returned to Canada but her husband refused to receive her as his wife again. She sued for alimony.

The husband pleaded that the action for alimony be dismissed. He alleged that since she had rented the apartment in London after his return to Canada she committed adultery with Mr. Hodgkinson. The wife countered the husband’s allegation, explaining that the child was not born of adultery but of artificial insemination. She said that she consulted doctors about her physical infirmity and a doctor suggested artificial insemination as a cure. Through arrangement with Mr. Hodgkinson, she was artificially inseminated under anesthetic in his apartment twice. The pleas of justification set up by the wife, in short, were: first, the child was born as a result of artificial insemination, and second, artificial insemination was a proper medical cure.

The court denied the first plea for the reason of that she evidently continued to commit adultery with Mr. Hodgkinson after renting the apartment and after she had been cured of her physical infirmity and was able to have intercourse without pain.

Denial of the first plea completed the case against the plaintiff, and yet the court dared to pass judgment on the second plea by reason of its unusualness.

The lawyer for the wife argued that the essential element of adultery rests in the moral turpitude of the act of sexual intercourse as usually understood. But the court did not agree with this and stated the following: From the Mosaic law down through the ecclesiastical law to the present date, adultery has been regarded as invasion of the primary object of marriage: namely, perpetuation of the human race. The essence of adultery is “the voluntary surrender to another person of the reproductive powers or faculties of the guilty person; and any submission of those powers to the service or enjoyment of any person other than the husband or the wife.” Sexual intercourse is adulterous because in the case of the woman it involves the possibility of introducing into the family of the husband a false strain of blood.

The ratio decidendi of this case was that alimony action raised by the wife had to be

---

6 Orford v. Orford, 47 Ont. L. R. 15 (1921).
dismissed because she had committed adultery. The precise opinion that artificial insemination comes within the definition of adultery is to be regarded as obiter dictum. The facts of this case show that adulterous wives are often artificially inseminated—either by allegation or even in fact—as a means of avoiding guilt.6

B. Hoch v. Hoch7

Since this is an unreported case only its outline can be known. When the husband returned home from two years service in the army, he found his wife two months pregnant. He then sued his wife for divorce on the grounds of adultery and others. The wife denied the fact of adultery and alleged that pregnancy resulted from artificial insemination. The court granted the divorce not on the ground of adultery but on the other grounds. Artificial insemination, the court ruled, was not legally sufficient for a divorce on the ground of adultery.

This case is considered, as is the Orford case,8 to deal with artificial insemination without the husband's consent. However, the decisions are completely opposite: in the Orford case artificial insemination was held to constitute adultery, but not in this case.

C. Strnad v. Strnad9

A decree of separation awarded to the wife the custody of the child and allowed the husband visitation rights once a week. The wife applied for the reopening of the case for the revocation of the husband’s visitation rights on the grounds that the child was conceived through artificial insemination and that, therefore, the child should not be treated as the legitimate child of the husband. Predicated on the assumption that the wife was artificially inseminated with the husband’s consent and that the child was not of the blood of the husband the court concluded as follows:

1. The child has been potentially adopted or semi-adopted by the husband and, therefore, the husband should be entitled the same rights as those acquired by a foster parent who has formally adopted a child.

2. Where a wife conceives a child through artificial insemination with the consent of the husband, the child is not an illegitimate child. Logically and realistically, the child is no different from an illegitimate child who is legitimatized upon subsequent marriage of his parents.

3. The court passed on neither property rights of the child nor the propriety of artificial insemination.

It has been pointed out that there are several logical inconsistencies in the legal construction of this decision.10 The first is in regard to the argument that the child is semi-adopted on the one hand but not illegitimate on the other hand. It is in general unacceptable for the real father to adopt his legitimate child, even though he can adopt his

8 Supra case A.
illegitimate child. If so, where the child is adopted or semi-adopted, he must have formally been an illegitimate child. In this respect, the decision is inconsistent.

Secondly, the decision concerns legitimation. But the essential element of legitimation is the acknowledgment of an illegitimate child by the real father. It is, therefore, impossible that the child who is not of his father's own can become legitimate by legitimation. The decision errs in this point also.

In any event, the husband took the child to Czechoslovakia after the decision and the wife brought the child back. For this reason, the decree of divorce finally granted the wife the sole custody of the child and denied the husband's visitation rights.11

Who is lawful father? It is not necessarily the biological father. If it could be thought that the legal relationship between father and child is based on the father's love (will) toward the child,12 couldn't it be said that the husband in this case possesses the essential qualification as the father, except that he seemed to go too far in his conduct. It should be regarded that the decision generally reoriented the position of the child born of artificial insemination, though its careless legal construction cannot be ignored.

D. L. v. L.13

The parties were married 1942 but for the first three years the husband made no attempt at intercourse. Thereafter, the wife suggested it but he was never able to consummate the marriage. The husband explained this was caused by his sense of failure with regard to consummation. In fall of 1945, the wife suffered from nervous trouble and the doctor who found the cause in the husband tried to persuade him to have psycho-therapy. In 1946 and during the period of September to December in 1947 the wife was inseminated artificially from the husband. In December, 1947 the husband finally underwent psychological treatment for a short term. But this was not sufficient to help him gain ability to have intercourse, and what is worse, it put an end to the wife's patience. In January, 1948 the wife left her husband without knowing that she was pregnant, and gave birth to a child in September. Petition for a decree of nullity was made by the wife on grounds of the husband's incapacity or, alternatively, willful refusal to consummate a marriage. The husband pleaded that the marriage was approbated by a voluntary act of the wife that led to conception.

The court discussed the issue in connection with estoppel and sincerity. First, estoppel would arise if, by her representations by word and conduct, she induced her husband to alter his position for the worse. Here, however, she had neither shown her acquiescence in an abnormal marriage nor misled the husband to a detrimental position. There was no estoppel as against him.

Secondly, the conception of the child was done with intention of producing normality in their sex relations and, therefore, was not regarded as an approbation of the abnormal marriage. Her motivation for artificial insemination was sincere.

Thus, the court ordered a decree nisi on the ground of incapacity.

It is said that homologous insemination is relatively rarely used. This seems the only

12 See Painter, Mark, I Love You (1967).
13 L. v. L., 1 All E.R. 141 (1949).
reported case concerning this form of insemination. The question discussed in this case, however, concerns not only homologous insemination. The same question could be raised in regard to heterologous insemination with consent of the husband.

The court did not directly approach the question: namely, nullity due to impotence and artificial insemination. The criticism that the court should have touched upon the question whether or not impotence can be cured by the conception of a child by artificial insemination is, I believe, proper.14

The writer here wants to express a doubt toward the idea that the marriage is void due to its unconsummation even after five years cohabitation. The court found the fact that “She had tried nobly to make a success of the marriage . . . . and further attempts would probably be intolerable for a sensitive woman. This marriage has been broken down hopelessly.” This finding indicates that the case is nothing more than a divorce case. As a result of holding the marriage nullity the court had to add the comment, “That the child should be made illegitimate is most regrettable.” It would be no exaggeration to say that the doctrine of unconsummated marriage is a harm left by the ecclesiastical marriage laws of medieval times.

E. Doornbos v. Doornbos15

In a divorce action the wife asked for the sole custody of the child. She filed a petition for a declaratory judgment that the husband was not in fact the child’s father and had no right to the child on grounds that the child was conceived by heterologous insemination and that he was not legally adopted.

The Superior Court stated the following in its opinion: (1) The child was illegitimate because he was not born of the parties. (2) The husband had no rights including that of visitation to the child even if he consented to artificial insemination. (3) The wife’s conduct constituted adultery. (4) Heterologous insemination, with or without the husband’s consent, was contrary to public policy or good morals.16

The decision produced much excitement in the journalistic world and keen argument in the judicial world. The State’s Attorney subsequently intervened in the divorce action, and upon denial of a motion to vacate the decree of divorce, he appealed.

The Appellate Court dismissed the appeal due to a technicality: that is, the State’s Attorney appealed only from the decree of divorce which was silent as to the legitimacy of the child. It was in the declaratory judgment that the question of legitimacy was determined. Neither evidence adduced upon hearing the application for the declaratory judgment nor the validity of the judgment was properly submitted to the Appellate Court. In short, the State’s Attorney made a mistake in the selection of the object of the appeal.

F. MacLENNAN v. MacLENNAN17

The parties were married in August, 1952 but had no marital relations after their separation in May, 1954. The wife gave birth to a child in New York, 1957 and the hus-

---

band asked for a decree of divorce on the grounds of her adultery.

The wife explained that she conceived the child as a result of heterologous insemination. The husband then maintained that he had never agreed to her being so inseminated if in fact it ever took place. The wife pleaded that heterologous insemination was not adultery even without the consent of the husband.

The issue in this case was whether or not heterologous insemination without consent of the husband constituted adultery as a ground for divorce. This question, however, could be extended to a general consideration of whether or not heterologous insemination per se constitute adultery, and if so, whether the husband's consent gives rise to the defense of connivance.

To discuss this question the Scottish court sought a solution in the definition of adultery from the works of leading legal writers and reported decisions. The court found in such works as the Book of Deuteronomy, the writings of St. Paul, and the works of the Canonists that the idea of conjunctio corporum seemed to be an inherent concomitant of adultery and in the decisions that marriage was not consummated when in the endeavour to achieve sexual intercourse there had been no penetration, although a child had been conceived by the wife as a result of fecundation ab extra by the husband.\footnote{Clark v. Clark, 113 L.J. 41 (1943).}

From these materials the court derived the following definition: (1) For adultery to be committed the two parties must be physically present and at the same time engage in the sexual act. (2) To constitute the sexual act there must be an act of union involving some degree of penetration of the female organ by the male organ. (3) It is not a necessary concomitant of adultery that the male seed should be deposited in the female's ovum. (4) The placing of the male seed in the female ovum by means other than the sexual act does not constitute sexual intercourse.

It accordingly followed that heterologous insemination did not constitute adultery.

If heterologous insemination is, in general, not adultery, proof of such insemination may rebut the inference of an adulterous act, which is inevitably drawn from the birth of a child following a long period of non-access. The court then decided to continue the cause to enable the wife to establish details as to the time, place and circumstances of the alleged insemination.\footnote{As the wife declined to provide necessary information as to the alleged insemination, the husband was eventually granted a divorce decree. Foote, Levy and Sander, Cases and Materials on Family Law, note 60 at 580.}

This case cited the American case of Doornbos v. Doornbos.\footnote{Supra case E.} But the Scottish court stated that the declaratory form of action was unknown to their procedure and the decision could not be followed in their law. The court gave the following criticism on the views of the American court: If heterologous insemination constitutes adultery, who is to be deemed as the adulterer? Suppose the donor is an adulterer, at what point of time has he committed adultery? Is it at the point when the seed is extracted from his body or at the point when the seed is injected into the woman's ovum? If it is at the former time, seed can be retained for a considerable time before being used and also may not be used at all. In this case it can only be adultery subject to defeasance in the event of the seed not being used. If it is at the latter time, adultery can be committed after the donor's death.
Moreover, suppose the administrator is an adulterer, and if the administrator is a woman doctor or the wife herself, how could it be understood?

On the contrary, this case does not mention the Canadian case of Orford v. Orford at all. Because the facts in both cases are quite similar in that the wife gave birth to a child after a long period of separation, it seems strange that the judge did not confront the elaborate dictum of the Orford case.

G. Gursky v. Gursky

The husband entered an action for annulment. He alleged that there was no issue of marriage. The wife counterclaimed for separation and afterwards alleged a counter-claim for annulment. The husband's action for annulment was dismissed for failure of proof, but the wife was granted an annulment because of the husband's failure to consummate the marriage.

The facts were as follows. The parties, upon discovery of the infirmities of the husband, sought medical advice and then the wife was artificially inseminated with semen of a donor with the consent of the husband. As a result of artificial insemination a child was born. The birth certificate listed the parties as father and mother.

The question was the status, particularly the support, of a child conceived by means of heterologous insemination performed with the consent of the husband. The Supreme Court in New York admitted that the statement in the birth certificate neither determined the parental status of the parties nor the status of the child, and rendered the following opinion.

(1) While section 112 of the New York City Sanitary Code set forth measures to be observed by physicians engaged in the practice of artificial insemination, such provisions of law constitute no more than a recognition of the existence of the practice and not a sanction of it. This must be read within the framework of the established concept of paternity.

The only case dealing with this subject in New York State, the case of Strnad v. Strnad, appeared superficially to say that a child born of heterologous insemination performed with the consent of the husband was legitimate, and yet close examination is required. The only question involved in that case was the husband's visitation rights. The court held him entitled to such rights because he was not an unfit guardian, but the interest of the child called for his reasonable visitation. The view expressed by the court that the child had been "potentially adopted" or "semi-adopted" by the husband was based on the implicit recognition that the child would be illegitimate. Since adoption was laid down as formal act by the statute, a child born of heterologous insemination who was not formally adopted was not to be legitimate by the rules of adoption.

In summary, all attempts to make a child born of heterologous insemination a legitimate child were criticized. It was held in such a situation that heterologous insemination constituted adultery on the part of the mother, with or without the consent of the husband,

---

21 Supra case A.
24 Supra case C.
and the child was illegitimate.\(^{25}\)

(2) The precedents indicated that a promise would be implied where the agreement was instinct with obligation and the implication was supported by the circumstances, and that an agreement might result as a legal inference from the facts and circumstances of the case, although not formally stated in words. The court stated that the husband’s declaration and conduct implied a promise on his part to support any offspring resulting from the insemination.

Moreover, the precedents stated that the doctrine of estoppel should be applied where there were words and deeds of one party upon which another party rightfully relied and changed his position into his injury, and that one could not, even innocently, mislead another and then claim the benefit of his deception. In this case, the “consent” was not a mere agreement but a request to the physician to conduct the artificial insemination for the purpose of providing a child. And the wife underwent insemination changing her position into her detriment in reliance of the husband’s expressed wishes. In such a situation, a financial burden should be born by the husband by application of equitable estoppel.

The court concluded that the husband was liable for the support of the child on the basis of an implied contract to support or by reason of application of equitable estoppel. But the court did not pass on personal rights including property rights that might exist between the husband and the child.

First of all, the court held in accordance with the traditional concept of paternity that a child born of heterologous insemination performed either with or without the husband’s consent was illegitimate. This almost certainly involved the denial of inheritance between husband and child. The trenchant criticism developed in obiter dictum of the case of Strnad v. Strnad\(^{26}\) might result in denying even the husband’s visitation rights. If anyone wished to preserve the theory expressed therein and yet accept the husband’s visitation rights he would be compelled to resort to the theory of implied contract or equitable consideration (e.g., that the husband has visitation rights in exchange for a duty to support the child.)

The real significance of this decision, however, is found in the conclusion that the husband is liable for the support of the child born of heterologous insemination performed with his consent by reason of existence of an implied contract or application of equitable estoppel. This decision has functioned as a precedent for analogous cases brought before the same court.\(^{27}\) The financial burden it casts upon the husband is very restrained, and, at least superficially, it contrasts strikingly with a decision rendered by the Supreme Court in California\(^{28}\) which held a child born of heterologous insemination performed with the consent of the husband to be legitimate.

H. Anonymous v. Anonymous\(^{29}\)

In a matrimonial action the plaintiff wife sought temporary alimony, i.e., support for

---

\(^{25}\) Supra case E.

\(^{26}\) Supra case C.

\(^{27}\) Supra case H.

\(^{28}\) Cf. infra case J.

herself and two daughters. The parties conceded that defendant husband was not impotent but sterile, and two daughters were born as the direct result of heterologous insemination after the parties made a written agreement thereto. The defendant’s argument was that the two girls were illegitimate and therefore support for them was not his problem by reason of the method of conception.

The Supreme Court in New York quoted one of the opinions in the case of Gursky v. Gursky30 to the effect that the husband’s written consent to heterologous insemination implied a promise on his part to furnish support for any resulting offspring, and determined the right of the wife to compel support for her and her children.

I. People v. Sorensen (1)31

Section 270 of the Penal Code in California provides that a father of either a legitimate or an illegitimate minor child who willfully omits to furnish support for his child is subject to a fine not exceeding one thousand dollars or imprisonment not exceeding one year. The question was whether the husband who gave his consent to heterologous insemination could be considered the father under this section of the code. The municipal court found him guilty and granted him probation for three years on condition that he make payment for support through the district attorney’s office. He appealed.

The facts were as follows: After seven years of marriage it was medically determined that the husband was sterile. The wife wanted a child either by artificial insemination or by adoption but he refused to give consent. At last, after fifteen years of marriage, he agreed to her proposal to undergo insemination. They saw the physician together and signed an agreement requesting the physician to inseminate the wife with the semen of a white male. A boy was born as the result of insemination. The information for birth certificate upon which the husband was named the father was given by the mother. He testified that he did not know the contents of the birth certificate.

For four years the family relationship was normal, the husband having told friends that he was the child’s father. In 1964, the wife was legally separated from the husband and lived with her son. At the time of separation, she told him that she wanted no support for her son and consented to the divorce. A divorce decree was granted him. In the summer of 1966, she became ill and could not work, and the county supplied public assistance under the Aid to Needy Children Program. He paid no support for the child after the separation although demands were made by the district attorney.

The court rejected all of the argument proposed by the prosecution. The major points are as follows.

(1) The adoption statute was not applicable to this case because an integral part of adoption procedure is an agreement in writing (Civ. Code 227).

(2) Section 230 of the Civil Code provided for adoption of an illegitimate child by the father’s public acknowledging it as his own, receiving it, with his wife’s consent, into his family and the like. This provision also was held inapplicable, applying only where the party charged was the real father.

(3) Contract doctrines such as implied contract which would create a liability essen-

---

30 Supra case G.
tially civil in nature was deemed irrelevant to a criminal case like this.

(4) Section 621 of the Evidence Code provided for the so-called conclusive presumption of legitimacy. It read that the issue of a wife cohabiting with the husband who is not impotent is conclusively presumed to be legitimate. But precedent, interpreting this section, recognized that blood tests of husband and the child might negate cohabitation and therefore paternity. The rule of this precedent was considered to include a case where the husband was sterile and the pregnancy was produced by artificial insemination.

(5) Section of the Evidence Code provided for a presumption that a child born during the marriage or within 300 days after the dissolution thereof was legitimate. But the court held that this presumption could be disputed by the husband or by the People, and easily overthrown where a statement of facts agreed to by both parties indicated that the party charged was not the actual father.

(6) The doctrine of estoppel was the basis on which the opinion of the municipal court judge was constructed and the theory on which the prosecution principally relied. But estoppel was considered almost exclusively related to civil matters and in such a criminal case as this its application could not be considered.

One of the theories upon which this decision was based is the logic of strict demarcation between criminal cases and civil cases. The court stated that there was an evident distinction between a criminal case, in which “the burden of proving every element of the crime rests upon the prosecution,” and a civil case, in which “principles of contract or equitable considerations may be applied.”

First of all this logic has been used as a tool to refuse the application to this case of implied contract or estoppel on which the opinion of the case of Gursky v. Gursky was founded. Moreover, this is connected with the unshakable notion that only a real father, except an adoptive father, falls under the category of “father” in section 270 of the Penal Code. One can but say that for prosecution to prove that the husband in this case was a real father was impossible.

Anyway the judgment was reversed. The husband was found not guilty, and the child was bastardized. This excited public opinion so greatly that even Japanese newspapers reported it.

In the importance that the instant decision attached to the biological relationship we can find the traditional or patriarchal concept of marriage which was directly stated in the case of Orford v. Orford. To make a husband who gave the consent bear the responsibility of a father seems to pass beyond the bounds of that traditional concept of marriage.

J. People v. Sorensen (2)

The opinion stated in the aforementioned decision was vacated and an appeal was
taken. The Supreme Court (McComb, J.) held that the defendant was the "father" within meaning of section 270, the Penal Code and stated:

(1) The father in section 270 cannot be limited to the biological or natural father. The crucial factor is whether the legal relationship of father and child exists. A child born through heterologous insemination does not have a natural father, as that term is commonly used. The anonymous donor cannot be considered the natural father, as he is no more responsible than the donor of blood or a kidney. He cannot dispute the presumption of legitimacy, because the presumption may be disputed only by the State, the husband or wife and their descendant (Evid. Code 661). With use of frozen semen, artificial insemination is possible after the death of the donor. In case there is no natural father, the court can look for a lawful father.

(2) The statute should be construed from the viewpoint of a reasonable man. A reasonable man, who because of his sterility wishes to have a child through heterologous insemination and gives consent to the treatment, knows that such behavior carries with it the legal responsibility of fatherhood. Therefore, consent is of such character as to impose the obligation of supporting those for whose existence is directly responsible. Without the husband's consent the child would not be procreated. A husband having given the consent comes under the "father" as used in section 270.

(3) A prosecution under section 270 only requires a prima facie finding of paternity by such evidence as would be sufficient to determine paternity in a civil action, provided that defendant does not succeed by evidence to raise a reasonable doubt about paternity. Evidence in this case consists of the written agreement requesting the physician to inseminate the wife, the birth certificate listing the defendant as the father and a copy of divorce decree. While the defendant testified that he did not know the contents of the birth certificate, it was not to raise a reasonable doubt about the fact that he was the father. Therefore, proof of paternity had been established beyond a reasonable doubt.

(4) The principal objective of section 270 is to protect the public from the burden of supporting a child who has a father able to support him. In California the primary liability for support is on the father and the mother is secondarily liable therefor. If the husband having given the consent is not the "father," the entire burden of support is placed on the child's mother. If she is unable to support the child the burden is then on society. Moreover, section 270 is intended to benefit all minors, legitimate or illegitimate. Needless to say, giving the father to an artificially conceived child not to bear the handicap of social stigma meets the intention of this section.

(5) A child resulting from heterologous insemination is not the product of an adulterous relationship. It is patently absurd to say that the doctor commits adultery, as the doctor may be a woman or the husband himself may administer the insemination. It also is absurd to say that the donor commits adultery. At the time of insemination he may be far away or may even be dead.

Thus the judgment rendered by the municipal court was affirmed.

The instant decision drew the attention of authorities because of its head-on treatment of the child artificially conceived as an legitimate child. This decision appears to make a striking contrast with the one of the New York Supreme Court which still holds the child

---

40 Smith, supra n. 2 at 1.
1974] CASES AND LEGISLATIONS CONCERNING ARTIFICIAL INSEMINATION 19
to be illegitimate. But a closer examination should be made of both decisions.

The only thing the court states in this case is that the consenting husband comes under
the category of a "father" as used in nonsupport statute, because by giving consent does
he assume the obligation to support the child. On the other hand, while it finds the child
illegitimate, the New York court orders the consenting husband to support the child.

Hence it may be said that there is no difference in substance between the two decisions.
But a great difference exists as to whether the term "father" is applicable to the consenting
husband and the term "legitimate child" to the child artificially conceived.

Why did the California court decide that these terms were applicable? The court stated
that it was because the statute relevant to the matter was intended to protect the public
from the burden of support and to benefit all children, but the writer thinks that there is
more to the reason. Because the principle that crimes are offences designated by statutes
is applied to criminal cases, the court would have been driven to say, in order to take
sanctions against the consenting husband, that he is the "father" in section 270 of the Penal
Code. The court is not allowed in a criminal proceeding to find him guilty under extention
of the meaning of section 270 as he is similar to the "father" therein.

However that may be, the opinion that the consenting husband also is the father could
not be understood without the change of paternity basis from blood to will. It would not
be an exaggeration to say that in this point man can find the historical movement of the
marriage concept from the institutional basis to contractual basis.

The California decision does not pass on the inheritance rights of the child artificially
conceived. But if he deserves to be called a legitimate child, the rights of inheritance
virtually should be given to him. Only one more step is needed from the California deci-
sion for him to be treated as legitimate both in name and fact.

III. An Analysis of Cases and Statutes

A. Concept of Institutional and Contractual Marriage

The history of family and family law is a history of dissolution. Its whole process
has usually been considered a movement "from status to contract" or "from institution
to companionship." In respect to the concept of marriage, institutional marriage, which
is the common law concept of marriage, has gradually been replaced by contractual mar-
riage. Recent phenomena such as the increase of divorce grounds in New York, the de
facto adoption of unilateral divorce in California, and the enactment of liberal abortion
laws in several states indicate the striking advance in recent times of the concept of
contractual marriage.

41 Supra case G and case H.
43 Kipp-Wolf, Familienrecht, 6 Aufl. S. 2 (1928); Boehmer, Die Vermögensverfassung des deutsclm Hauses,
SS. 1 f. (1943); Staudingers Kommentar, Erbrecht 1, Einleitung § 12 Bem. 2 (Boehmer); Dölle, Familien-
recht, Bd. 1, S. 39.
44 Maine, Ancient Law, 5 London ed. (1877). And see Tönnies, Gemeinschaft und Gesellschaft, 4. u. 5.
Aufl. (1922).
Let us discuss and clarify these concept of marriage. Looking first at the concept of institutional marriage, this philosophy was inherited from common law which, in turn, came from the ecclesiastical law of medieval times. The strong notion of the lifelong union of one man and one woman to the exclusion of all others is the basic character of this concept of marriage. In other words, procreation of children should take place only within the limits of monogamous marriage. In this concept, the parties are free to enter into marriage but marital relationship itself is previously fixed by the law and can never be altered at their will. Marriage is deemed a contract sui generis. The husband is liable only for his own children born of his wife. Adultery is moral turpitude and any illegitimate child is filius nullius. Blood ties or a biological relationship between parent and child is considered important in this concept.

Furthermore, divorce is not desirable because it would threaten the propagation and education of children. Only judicial divorce is accepted and even divorce by consent is never allowed. The marriage having been ordained for the procreation, consummation is one of the essential duties, and therefore if either of the parties is not capable of satisfying this duty, the marriage contract is nullified. Thus, in this concept, a notion of void marriage is recognized in addition to divorce.

Regarding the concept of contractual marriage, the domination of the parties' will in entering into, altering, and dissolving the marriage relationship is accepted. Since the parties can marry at their free will, they must be free to determine whether or not they will have children and what means they will take to have children. The parent-child relationship in this concept is founded not only on biological ties but also on the intention of the parties to create the relationship. According to this concept, everything is determined on the basis of the individual happiness of the two parties concerned. If the marriage is no longer capable of providing for the happiness of the parties, they should be able to get a divorce at their own free will. Therefore, the decision of whether or not to have children or what means to take is based on whether or not the parties will find happiness with them. Moreover, there is no need to accept a notion of void marriage. Divorce is enough.

Then, what view do these two concept of marriage take of artificial insemination? According to the concept of institutional marriage, artificial insemination is entirely unacceptable. Even homologous insemination raises issues. Where the husband is impotent homologous insemination might be performed, but in this case the marriage is nullified and hence children born of a void marriage are illegitimate. And even if such illegitimate children are acknowledged by the father, they are subject to various social and legal disadvantages.

From such a point of view, heterologous insemination is of course entirely out of question. Heterologous insemination implies that a third party interferes in the marital relationship which must be an exclusive union. Such interference by the third party not only constitutes adultery on the part of his wife but also renders the children born of the process illegitimate. The husband is liable only for his actual children but not for the children just of his wife.

In the contrast of this, the concept of contractual marriage gives uncritical acceptance to artificial insemination. If the parties find that children are necessary to their mutual
happiness, the wife can take advantage of the process of artificial insemination whether it be homologous or heterologous. The state should provide proper protective measures for artificial insemination so that the desiring parties can use the treatment without hesitation. For example, a law which makes legitimate the child resulting from heterologous insemination performed with the husband's consent should be enacted.

The concept of contractual marriage is, however, often described as modification of rather than contradictory to the concept of institutional marriage. Therefore, there are not a few legal writers who believe in the justifiability of heterologous insemination in the case in which the treatment is performed with both parties' consent for a medical cure of the husband's sterility.

B. Case of Homologous Insemination

Then, let us examine the cases introduced in the previous chapter II. Among ten cases, one case is concerned with homologous insemination and the other nine cases are concerned with heterologous insemination, of which three are without the husband's consent and the remaining six are with the husband's consent.

It seems that the only case concerning homologous insemination presents many issues on the theory of nullity for the husband's impotence, which is derived from the concept of institutional marriage.

If the conception as a result of homologous insemination is considered ratification of the void marriage, the wife must remain in the marital relationship. This is very unfair because she might have made every effort to surmount the problem of the husband's impotence and failed to do so. On the contrary, if nullity is granted by reason of the husband's impotence, the wife, at least theoretically, cannot receive alimony and the children born of such union are illegitimate because the marriage never came into existence. At any rate, it brings disadvantageous result to both the wife and the children.

Thus, if the theory of nullity for impotence is not supported as a good social policy, it would imply that the concept of institutional marriage, as far as this theory is concerned, is deadlocked. Such a limited interpretation as that impotence does not contain sterility also indicate that the interpreter gives up to think about procreation as the purpose of marriage.

C. Cases of Heterologous Insemination without Husband's Consent

Of three cases concerning heterologous insemination without the husband's consent, the wife in Orford v. Orford sought alimony from her husband, and the husbands in Hoch
v. Hoch\(^{56}\) and MacLENNAN v. MacLENNAN\(^{57}\) sought divorces. All three of the cases take up the question of whether or not heterologous insemination constitutes adultery. No detailed report of Hoch v. Hoch has been published. Therefore, in this section, the two other cases will be examined.

Comparison of Orford v. Orford with MacLENNAN v. MacLENNAN shows that the facts in both cases are considerably similar. In both cases the wives gave birth to children after a long period of non-access. The court in Orford v. Orford determined the fact that the wife had committed adultery. In MacLENNAN v. MacLENNAN, however, the wife declined to establish the fact that she had been artificially inseminated. These cases seem to indicate that the wives tend to resort to artificial insemination as means of avoiding guilt.

On the question whether or not heterologous insemination performed without the husband's consent constitutes adultery, the courts in these cases are extremely divergent in response. The opinion in Orford v. Orford is that heterologous insemination is adultery by reason of that adultery consists in the voluntary surrender to another person of the reproductive powers. The opinion in MacLENNAN v. MacLENNAN, on the contrary, that heterologous insemination is not adultery by reason of that one of the essential elements of adultery consists in actual sexual act.

Hereupon, what we have to take notice of is that both opinions in these cases do not give any consideration to the husband's consent. If adultery is defined as a voluntary surrender to another person of the reproductive powers, heterologous insemination always constitutes adultery. And if the actual sexual act is an essential factor for adultery, heterologous insemination never constitutes adultery.

It is needless to say that the theory in Orford v. Orford is based on the concept of institutional marriage. This is quite clear from the decision of the court, after defining adultery according to the marital purpose of procreation, explaining that sexual intercourse is adulterous because in the case of woman it contains the possibility of introducing into the family of the husband a false strain of blood.

On the other hand, it is a problem as to whether or not the theory in MacLENNAN v. MacLENNAN is frankly affirmed from the viewpoint of the concept of contractual marriage. The conclusion in this case that even heterologous insemination does not constitute adultery seems reached merely by syllogism from the legal concept of adultery\(^{58}\) which makes the actual sexual act an essence of adultery. It seems, hence, that this conclusion has no teleological relation, at least directly, to the concept of contractual marriage. It is certain that in the concept of contractual marriage the husband's will is literally respected as to important decisions in the marital life.

Regarding the theory in Orford v. Orford in which heterologous insemination constitutes adultery, it seems that the husband's consent gives the wife a defense of connivance. However, regarding the theory in MacLENNAN v. MacLENNAN in which heterologous insemination never constitutes adultery, such insemination performed without the husband's consent can probably be dealt with on divorce grounds other than adultery such as cruel and inhuman treatment.\(^{59}\) In this sense, artificial insemination cannot be effectively dealt

---

\(^{56}\) Supra case B.

\(^{57}\) Supra case F.

\(^{58}\) This concept seems to be the one derived from the Christian asceticism.

\(^{59}\) Notes, supra n. 2 at 875. And see supra case B.
with by any existing legal idea of adultery, and consequently there are loud cries for legislation which prescribes heterologous insemination without the husband's consent as an independent divorce ground.60

D. Cases of Heterologous Insemination with Husband's Consent

Of the six cases concerning heterologous insemination with the husband’s consent, two are connected with the husband’s visitation rights and the other four are connected with the husband’s duty of support. As for the husband’s visitation rights, the decisions are equally divided into pro61 and con,62 and as for the husband’s duty of support, there are more affirmative decision63 than negative one.64

In case the wife asserts her right of absolute custody of the child born of heterologous insemination, the question of whether or not the husband can be given visitation rights is not a matter merely left to the court’s decision. The court has to determine that the husband is a father of the child before judging the matter of whether or not the husband is a fit person to have visitation rights. It is generally understood that parents, as a rule, have preferential rights of custody of the children.65

As for the consenting husband’s duty of child support, on the contrary, it seems possible, as a few cases66 indicate, to explain its basis according to contract in disregard of parent-child relationship. The contract of this case is the one which is made between the husband and the wife for the coming child as a beneficiary, and its character is similar to that of contract for a third party.

However, when both of the parties consent to the practice of heterologous insemination, would it be possible to consider that the parties made this kind of contract between them? The consent to the practice of heterologous insemination is an expression of a desire to have a child. Such desire to have a child may, in the family at present, carry the comprehensive responsibilities for the coming child. If so, it seems unnatural and somehow fictitious to pick out only the duty of support from those comprehensive responsibilities and to explain it according to contract.

Moreover, although such contract has a binding power upon the husband, it does not extend to a third party such as the government. Therefore, the child born of heterologous insemination, for example, cannot claim a benefit of social security from the Federal Government as the child of a “wage earner.”67 It is, then, better to construct the duty of support as an effect of the parent-child relationship. The question as to whether or not he has the duty of support will end in the question of whether or not there is a parent-child relationship between the husband and the child born of heterologous insemination.

Many theories have been formulated both inside and outside of the court as to how the consenting husband is a father of the child born of heterologous insemination. Some

60 Clark, supra n. 10 at 329.
61 Supra case C.
62 Supra case E.
63 Supra cases G, H and J.
64 Supra case I.
65 Clark, supra n. 10 at 591.
66 Supra cases G and H.
67 Clark, supra n. 10 at 656.
of the more outstanding ones will now be reviewed:

(1) Let us, first, discuss the possibility of utilizing the birth record of the child. Where the husband is listed as the father on the birth record, it might be construed as meaning the acknowledgment of himself to be the father of the child. The appearance of the father’s name on the birth record of an illegitimate child has the effect of acknowledging his paternity of the child.68

However, acknowledgment of an illegitimate child is to be made by a real (biological) father of the child, and yet the consenting husband cannot be a real father of the child born of heterologous insemination. In other words, in so far as the existence of biological paternity is a requisite for legal acknowledgment, the acknowledgment by the consenting husband cannot be the same as the acknowledgment by the father of an illegitimate child. Therefore, it is not necessarily reasonable to apply the principle of acknowledgment to the husband’s consent to heterologous insemination.69

(2) The presumption of legitimacy of a child is provided for in many statutes. In general, the child whom his mother conceived in wedlock or in cohabitation is presumed legitimate. This is one of the strongest presumptions and thus is rarely overcome.

As an allowable evidence to rebut this presumption in the case of a child born of heterologous insemination, blood type is considered. If the probability that the child born of heterologous insemination is not a child of the husband is sufficiently strong on the basis of blood type, the presumption overturns.70

Then, lawyers who, by applying the presumption of legitimacy, try to prove the husband to be a father of the child born of heterologous insemination, urge the couple to select the donor from among persons who have the same blood group as that of the husband and also to mingle semen of the donor with that of the husband.71

However, if the presumption of legitimacy also can be overcome by the proof of the husband’s sterility and performance of heterologous insemination,72 there still remains some possibility that the presumption overturns even if such measures are taken. Such measures are merely means to entangle to the fact-finding of the parent-child relationship.

(3) The California Supreme Court decided that a parent-child relationship is constituted between the consenting husband and the child born of heterologous insemination by the wife,73 and yet the New York Supreme Court gave the decision to the effect that, according to the traditional concept of marriage, the child born of heterologous insemination is illegitimate.74 In jurisdictions other than California and New York, the attitudes of the courts seem to be still unsettled. Judging from this present situation, lawyers usually come to recommend that the consenting husband adopts the child born of heterologous insemination in order to avoid such child becoming illegitimate.

However, it is said that even the husband who consented to heterologous insemination is usually apt to avoid adopting the child born of such process because he is afraid of the

69 Supra cases C and G; Notes, supra n. 2 at 878.
70 Supra case I.
71 Weinberger, A Practical Solution to Legitimacy Problems Arising from the Use of Artificial Insemination, 35 Ind. L.J. 152 (1959); Clark, supra n. 10 at 157.
72 Notes, supra n. 2 at 877.
73 Supra case J.
74 Supra case G.
notoriety to the child's existence spreading over from the procedure for adoception and the resulting records. From the practical point of view, it is certainly inconceivable for the husband who is reluctant even to draw a will to take the more complicated procedure for adoption. Besides, when the husband dies before the adoption is completed, adoption becomes impossible. Thus it seems that encouraging the husband to adopt the child born of heterologous insemination is also an issue.

(4) Because artificial insemination in humans is a relatively recent development, it is not surprising that the existing statutes do not make provisions for it.

In general, when the court deals with a new phenomenon which is not provided for in the existing statutes, it endeavors to expand the existing concepts and to incorporate the new contents into them. The appearance of such unfamiliar wordings as "potentially adopted or semi-adopted" seems to indicate the frustration experienced by the court.

It must be with his desire to have a child when the sterile husband gives his consent to heterologous insemination. Such consent of the husband should imply his intention of treating the child born of heterologous insemination as his own child. And it should be the same kind of intention with which a couple adopt the child. When the existing statutes provide for adoption, would it not be justifiable for the court to take the same policy toward heterologous insemination as toward adoption so that the court can advance the welfare of the child and realize the desire of the adults.

The husband's consent generally implies the undertaking of the whole responsibility for the child. It does not mean only placing the husband under obligation to support the child born of heterologous insemination. In such case the child would be turned adrift were the husband to die while the child was still a minor. Then, the husband's undertaking of the responsibility for the child implies designating him to be his successor. In this sense, the husband's consent to heterologous insemination implies the unilateral creation of a parent-child relationship between him and the child born of heterologous insemination.

The idea that only a biological child is considered as a lawful child is still strong. But, actually, a lawful child is not always a biological child. The present trends of the society, such as "from status to contract," "from institution to companionship" or "from institutional marriage to contractual marriage" seem to indicate that the establishment of parent-child relationship by an intention or a will has been gradually acknowledged, even though it is somehow complementary.

(5) There is at present no case in any other jurisdiction except in California regarding the child born of heterologous insemination as a legitimate child. And the status of the child born of such process is still insecure. Accordingly, there are loud cries for reform of the statutes. As for reformed statutes of this kind, there are at present the Georgia Law enacted in 1964 and the Oklahoma Law enacted in 1967.

In the former law, the child born of heterologous insemination is "irrebuttably presumed legitimate" when the husband and the wife consent in writing to the practice of insemi-
In the latter law, the written consent of the husband and the wife is also required as to performing heterologous insemination, and the child born of heterologous insemination with such consent is considered "in all respects the same as a naturally conceived legitimate child." However, this law differs from the former law in that the court should acknowledge the consent of the husband and the wife according to the procedures in adoption. It seems that such acknowledgment by the court merely makes the practice of heterologous insemination difficult and is an unnecessary interference.

IV. Conclusion—Comparative Study of American Law and Japanese Law

Hitherto we have studied various aspects of artificial insemination from the family law's point of view, especially laying stress on Anglo-American law. Some of the problems regarding artificial insemination cannot always be conducted with the existing legal concepts or the existing statutes. And consistent elucidation of this matter has to be based on the new concept of marriage: that is, the concept of contractual marriage. Then let us conclude this paper by examining the points which are at issue on the cases of the Anglo-American law in comparison with the Japanese law.

It may be said that there are already at least 10,000 children born of artificial insemination in Japan. Although there is yet no judicial case regarding artificial insemination, it is said that such matters sometimes are talked about on occasions of conciliation procedures in family courts.

A. As for homologous insemination, in Anglo-American law, since marriage is nullified when the husband is impotent, it is at issue whether or not conception by means of homologous insemination cures the defect of the husband's impotency.

Hereupon, it may be said that the concept of unconsummated marriage has not been introduced into Japanese law. The grounds for nullity in the Japanese Civil Code are limited to "where there is no intention to marry between the parties owing to a mistake of the identity of the person or any other cause." Matters regarding attributes of the person, like impotency, do not fall under the grounds for nullity. Consequently, the question of whether or not conception by means of homologous insemination does not become an issue. In Japan, there is no particular legal issue regarding homologous insemination.

B. One of the issues which was disputed in Anglo-American courts is whether or not heterologous insemination constitutes adultery as a ground for divorce. In case of taking the construction that heterologous insemination constitutes adultery, the husband's consent would give the wife a defense of connivance. And in case of taking the construction that heterologous insemination does not constitute adultery, on the other hand, heterolo-

---

79 Code (Ga) 74-101 1(a).
81 Id. 553.
82 Cf. supra III D (3).
83 Cf. supra II D and III B.
84 Civil Code of Japan 742 1.
gous insemination without the husband's consent would constitute other ground for divorce. In any case, it is a common view in Anglo-American law that divorce is granted only when heterologous insemination has been performed without the husband's consent.\footnote{85 Cf. supra 111 C.}

It seems that the same conclusion should be drawn in the construction of Japanese law. That is, if it is construed that heterologous insemination constitute "an act of unchastity,"\footnote{86 Civil Code of Japan 770 1 l.} the husband's consent would be a ground for dismissal of the petition for divorce.\footnote{87 Id. 770 II.} If, on the other hand, it is construed that it does not constitute "an act of unchastity," heterologous insemination without the husband's consent would come under such a ground for divorce as "any other grave reason which makes it difficult to continue the marriage."\footnote{88 Id. 770 1 5.}

C. The question is the status of the child born of heterologous insemination. In the Japanese civil law, the child who was conceived by the wife during marriage is presumed to be a legitimate child.\footnote{89 Id. 772.} It is one of the strongest presumptions, and the right to rebut the presumption is given only to the husband.\footnote{90 Id. 774.} The husband may exercise the right only for one year after he became aware of the child's birth.\footnote{91 Id. 777.} The status of the child born of heterologous insemination is usually, in Japan, dealt with in connection with the application of the presumption of legitimacy.

In dealing with the application of the provision of presumption of legitimacy, it is necessary to pay attention to the following two matters. First, the presumption of legitimacy is concerned with a real (biological) parent and child, and does not apply to the adoptive parent and child whose relationship is formed of their own will.\footnote{92 In Japan, as in West Germany, adoption is made by contract between adoptive parent and child or his (her) legal representative.}

It has been suggested above that the parent-child relationship between the husband and the child born of heterologous insemination is created by the husband's will.\footnote{93 Cf. supra III D (4). The consent which is given after the child's birth also suffices to render the child legitimate. The consent may be given explicitly or implicitly.} If his concept is correct, the provision of presumption of legitimacy does not apply to this kind of parent-child relationship, just as it does not apply to the adoptive parent and child. In this sense, the child born of heterologous insemination with the husband's consent become a legitimate child whose legitimacy can never be denied by the husband.\footnote{94 Wagatsuma, Family Law (Shinzoku-ho) 229 (1961).}

Secondly, because the provision of presumption of legitimacy is concerned with the real (biological) parent-child relationship, it does not apply to the parent and the child between whom the real parent-child relationship apparently does not exist.\footnote{95 It is generally accepted in Japan that in case no normal marriage life exists the presumption of legitimacy is precluded from working and consequently an action for the negative confirmation of paternity is allowed, because the competent plaintiff and the limitation of an action for rebuttal of the presumption are too restricted.} In this sense, even though the child has been entered as a legitimate child in the family register (koseki),
an application may be made to the court for the negative confirmation of parent-child relationship at any time and by any person who has legal interests on that relationship. This kind of child is called a "legitimate child who is not presumed." The child born of heterologous insemination without the husband’s consent should be treated as a "legitimate child who is not presumed."96

Moreover, the doctrine of de facto adoption is not satisfactory as an aid to the child born of heterologous insemination with the husband’s consent. It is the common view that at least the de facto adopted child is not given the right of inheritance. This is because a technicality of modern law requires that an owner of the right of inheritance must be registered on the public record.

96 Z. Nakagawa, Family Law (Shinzoku-ho), 2. ed. 365 (1965). Nonpaternity could be established by the proof of the husband’s sterility and of heterologous insemination. The theory (Wagatsuma, supra n. 94 at 221) that the presumption of legitimacy is precluded from working only when nonpaternity is externally apparent (e.g., in case of a husband being absent for a long time) comes to the undesirable conclusion (Wagatsuma, supra n. 94 at 229) that a child born of heterologous insemination without the husband’s consent also is presumed to be legitimate.